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15     **ATTORNEYS FOR DEFENDANT MARIN COUNTY, TEXAS**

16     IN THE UNITED STATES DISTRICT COURT

17     FOR THE SOUTHERN DISTRICT OF CALIFORNIA

18     CASIANO N. ALFORQUE

19     Plaintiff,

20     v.

21     MARTIN COUNTY, TEXAS,

22     Defendant.

23     Case No. 3:08-CV-0613-WQH (WMC)  
24     ECF

25     DEFENDANT'S MEMORANDUM OF  
26     POINTS AND AUTHORITIES IN  
27     SUPPORT OF MOTIONS TO DISMISS  
28     AND MOTIONS TO TRANSFER VENUE

29     JUDGE: WILLIAM Q. HAYES

30     HEARING DATE: AUGUST 25, 2008  
31     TIME: 11:00 a.m.  
32     COURTROOM: 4  
33     NO ORAL ARGUMENT UNLESS  
34     REQUESTED BY THE COURT

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1 COMES NOW Defendant MARTIN COUNTY, TEXAS, and files this its Memorandum of  
2 Points and Authorities in Support of Defendant's Motion to Dismiss for Lack of Personal  
3 Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(2), or alternatively, Motion to  
4 Dismiss for Failure to State a Claim Pursuant to Federal Rule of Procedure 12(b)(6) and 28 U.S.C.  
5 § 1915, or alternatively, Motion to Dismiss for Improper Venue Pursuant to Federal Rule of Civil  
6 Procedure 12(b)(3), or alternatively, Motion to Transfer Venue to a Proper District Pursuant to 28  
7 U.S.C. § 1406(a), or alternatively, Motion to Transfer Venue for the Convenience of the Parties  
8 Pursuant to 28 U.S.C. § 1404(a).

9

10 **I. Introduction**

11 A. Plaintiff is CASIANO N. ALFORQUE ("Alforque"). He is an individual who resides  
12 in San Diego, California. Defendant is MARTIN COUNTY, TEXAS ("the County"). The County  
13 is a political subdivision of the State of Texas.

14 B. On April 3, 2008, Alforque sued the County. In his lawsuit, Alforque alleges that in  
15 2005 he was illegally searched and arrested in Martin County, Texas and charged with possession of  
16 a controlled substance.

17 C. Service of process was mailed to the County on June 17, 2008. The County received  
18 the service of process on June 30, 2008.

19 D. These motions are filed within twenty (20) days of the date on which the County was  
20 served with process in this lawsuit and by the response deadline of July 21, 2008 set by this Court.

21 E. The pleadings upon which these motions are based are those in Alforque's Original  
22 Complaint filed in this Court on April 3, 2008. The factual and legal grounds and jurisdictional and  
23 venue evidence upon which these motions are based are set forth in Section II below. The County  
24 has not filed an Answer. As evidence in support of its motions challenging jurisdiction, if necessary  
25 to determine that issue, and venue, the County relies upon the following affidavits and exhibits  
26 produced in the attached Appendix filed concurrently:

Exhibit A—Documents from the District Clerk's file in the matter of The State of Texas v. Nicholas Alforque Casiano, Cause No. 7871 in the County Court of Martin County, Texas.

**Exhibit B—Declaration of James L. McGilvray, Martin County Attorney.**

**Exhibit C—Declaration of Charles T. Blocker, County Judge for Martin County, Texas.**

## **II. Argument and Authorities**

**A. Dismissal for lack of personal jurisdiction is proper pursuant to Federal Rule of Civil Procedure 12(b)(2).**

## 1. The Standard

Federal Rule of Civil Procedure 12(b)(2) provides for the dismissal of a case prior to the filing of an answer where the plaintiff fails to establish personal jurisdiction over the defendant.<sup>1</sup> To satisfy personal jurisdiction over a nonresident of the forum state, two requirements must be met: (1) the forum state's long-arm statute must permit jurisdiction; and (2) the exercise of the forum state's long-arm statute must not violate the defendant's guarantee of due process under the Fourteenth Amendment.<sup>2</sup> The California long-arm statute authorizes a federal court to exercise personal jurisdiction over nonresidents to the maximum amount allowed by the Due Process Clause of the Fourteenth Amendment.<sup>3</sup> Therefore, personal jurisdiction is established whenever the requirements of federal constitutional due process have been satisfied.<sup>4</sup>

To satisfy the due process requirements of the Fourteenth Amendment, a nonresident defendant (1) must have purposefully established “minimum contacts” with the forum state, and (2) the exercise of jurisdiction must comport with fair play and substantial justice.<sup>5</sup> Minimum contacts

<sup>1</sup> Fed. R. Civ. P. 12(b)(2).

<sup>2</sup> *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1207 (9th Cir. 1980).

<sup>3</sup> Cal. Code Civ. P. Ann. § 410.10 (Deering 2006); see also *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).

<sup>4</sup> *FDIC v. British American Ins. Co. Ltd.*, 828 F.2d 1439, 1441 (9th Cir. 1987).

<sup>5</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S. Ct. 2174 (1985).

1 may be established through contacts sufficient to demonstrate either specific or general jurisdiction.<sup>6</sup>  
 2 Specific jurisdiction applies to a controversy that is directly related to or that arises out of a  
 3 defendant's contacts with the forum—in other words, where personal jurisdiction relies on the  
 4 relationship between the defendant, the forum, and the cause of action.<sup>7</sup> Such specific jurisdiction is  
 5 established by the following three-part test: (1) The non-resident defendant must have purposefully  
 6 directed his activities or have consummated some transaction with the forum or resident thereof; (2)  
 7 the cause of action must arise out of or result from the defendant's forum-related activity; and (3) the  
 8 forum's exercise of personal jurisdiction must comport with fair play and substantial justice, i.e., it  
 9 must be reasonable.<sup>8</sup>

10       Alternatively, general jurisdiction applies where a defendant maintains substantial,  
 11 continuous and systematic contacts with the forum state that are unrelated to the plaintiff's cause of  
 12 action and that approximate physical presence.<sup>9</sup> It is not enough that a defendant simply has  
 13 contacts with individuals in the forum state, but the defendant must actually be doing some form of  
 14 business in the state.<sup>10</sup> A court evaluating general jurisdiction should consider such factors as  
 15 “whether the defendant makes sales, solicits or engages in business in the state, serves the state's  
 16 markets, designates an agent for service of process, holds a license, or is incorporated there.”<sup>11</sup>

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21       <sup>6</sup> See *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S. Ct. 1868  
 22 (1984); *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

23       <sup>7</sup> See *Helicopteros*, 466 U.S. at 414-16 and n.8.

24       <sup>8</sup> See *Yahoo! Inc.*, 433 F.3d at 1205-06. The first factor cited in this test is limited to the “purposeful  
 25 direction” formulation of that factor as is appropriate to tort actions rather than to contract actions, as  
 noted by the court in *Yahoo! Inc.* This is the test applicable to Mr. Alforque's claims.

26       <sup>9</sup> See *Helicopteros*, 466 U.S. at 414-16 and n.9; *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223  
 27 F.3d 1086, 1087 (9th Cir. 2000).

28       <sup>10</sup> See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarian Co.*, 284 F.3d 1114 (9th Cir.  
 2002).

29       <sup>11</sup> *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1171 (9th Cir. 2006).

1           In response to a nonresident defendant's challenge to jurisdiction, the plaintiff bears the  
 2 burden of proving that jurisdiction exists.<sup>12</sup>

3           **2. The County does not have any contacts with California that are sufficient to**  
 4           **meet the minimum contacts necessary to establish either specific or general**  
 5           **personal jurisdiction.**

6           *a. No specific jurisdiction*

7           Mr. Alforque has not alleged any facts that would make a *prima facie* case for personal  
 8 jurisdiction over the County. As an initial matter, to establish personal jurisdiction over the County,  
 9 Mr. Alforque would have to establish that some County official took some action related to his  
 10 allegedly false arrest and that charges were falsely initiated against him<sup>13</sup> by a County official  
 11 pursuant to some policy or custom of the County.<sup>14</sup> Nothing in his pleadings suggests that either is  
 12 the case. If fact, Mr. Alforque alleges that he was arrested by a "Texas state trooper", who is an  
 13 officer of the Texas Department of Public Safety. The Texas State Trooper, or Texas Highway  
 14 Patrol officer, who searched and arrested Mr. Alforque was not an officer of the County, and there is  
 15 no evidence to suggest that any County official participated in the search and arrest of Mr.  
 16 Alforque.<sup>15</sup>

17           In any event, in analyzing the first, or "purposefully directed", factor for determining  
 18 "minimum contacts", a court should employ the "effects" test, which requires a plaintiff to establish  
 19 that the defendant: (1) committed an intentional act, (2) expressly aimed at the forum state, (3)  
 20 causing harm that the defendant knows is likely to be suffered in the forum state.<sup>16</sup> This test

24           <sup>12</sup> See *Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984).

25           <sup>13</sup> These are the two allegations that the County addresses below as being possible claims based on  
 26 the allegations in Mr. Alforque's pleadings.

27           <sup>14</sup> See *Ziegler v. Indian River County*, 64 F.3d 470, 474 (9th Cir. 1995).

28           <sup>15</sup> App. at p. 65, ¶ 4.

16           <sup>16</sup> See *Yahoo! Inc.*, 433 F.3d at 1206.

1 "focuses on the forum in which the defendant's actions were felt, whether or not the actions  
2 themselves occurred within the forum."<sup>17</sup> The "intentional acts" alleged by Mr. Alforque include his  
3 arrest while he was travelling through Martin County, Texas, and the initiation of criminal charges  
4 against him while he was in Martin County, Texas. It is clear that Mr. Alforque's arrest and the  
5 initiation of criminal charges against him does not bear any relation to California. Neither of these  
6 actions were directed against Mr. Alforque while he was anywhere other than in Martin County,  
7 Texas. Other than filing of charges against Mr. Alforque, the County has no other significant  
8 relationship with him.<sup>18</sup> The fact that Mr. Alforque's home forum is there, and that he returned there  
9 after his arrest, is insufficient to establish minimum contacts on the part of the County with  
10 California.<sup>19</sup> No aspect of the parties' course of dealings with each other is related to California  
11 other than the fact that some aspects of the County's dealings with Mr. Alforque have been carried  
12 out in the form of correspondence addressed to him or persons representing him while he was in  
13 California.<sup>20</sup> However, correspondence to the forum state is not sufficient to establish personal  
14 jurisdiction over the sender of the letter.<sup>21</sup>

17 Even were Mr. Alforque's possible allegations of false arrest and malicious prosecution true,  
18 as they must be presumed for purposes of this Motion to Dismiss, all the harm that the County would  
19 know was likely to be suffered by him was also in while he was in Texas. According to Mr.  
20 Alforque's own pleadings, he was subjected to a search and arrest here. He was subjected to the  
21 initiation of criminal charges here. Indeed, as long as he is in California and does not return to  
22 Texas, Mr. Alforque is beyond the reach of the County to subject him to any penalty or punishment

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24 <sup>17</sup> *Id.*

25 <sup>18</sup> App. at p. 35, ¶ 6.

26 <sup>19</sup> See *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995) (a defendant  
27 cannot "be haled into a jurisdiction solely as a result of . . . the unilateral activity of another party").

28 <sup>20</sup> App. at pp. 2-33.

<sup>21</sup> See *Yahoo! Inc.*, 433 F.3d at 1208.

1 based on his arrest or the charges filed against him for violating Texas' criminal law. Further, the  
 2 fact that the "ramifications of the charges which were falsely brought against him" allegedly include  
 3 "loss of wages", "insurmountable bills" and "loss of licenses in the field of Real Estate", even if true,  
 4 does not establish a "harm" that was "caused" by the County's actions. These are the actions of  
 5 other parties, or they are "ramifications" that are too attenuated to establish jurisdiction over the  
 6 County.<sup>22</sup>  
 7

8 Plainly, the facts do not show that this lawsuit arose out of any contacts or activity  
 9 that the County purposefully directed toward the forum State of California. To the contrary, it arose  
 10 out of activity that occurred solely in Texas. None of the County's officials, employees, agents or  
 11 representatives purposefully availed the County of the privilege of doing any official business in the  
 12 State of California or invoked the benefits and protection of its laws, nor could any of those activities  
 13 have led the County to reasonably expect to be haled into court in California. Consequently, no  
 14 basis exists for this Court's exercise of specific personal jurisdiction over the County in this lawsuit.  
 15

16       **b.     *No general jurisdiction***

17 General personal jurisdiction over the County does not exist because the County does not  
 18 have the substantial, continuous and systematic contacts with the forum State of California,  
 19 unrelated to Mr. Alforque's cause of action, that are necessary to establish such jurisdiction. The  
 20 County is a political subdivision of the State of Texas, formed under the laws of that State, with its  
 21 office and principal place of business in Stanton, Martin County, Texas; all offices are maintained  
 22 solely within the territorial limits of the County.<sup>23</sup> The County does not have any office or other  
 23 facility in California, and it does not have any officials, employees, agents, or representatives who  
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 27       <sup>22</sup> See *Omeluk*, 52 F.3d at 270 ("This 'purposeful availment' requirement ensures that a defendant  
 28 will not be haled into a jurisdiction solely as a result of . . . 'attenuated' contacts").

28       <sup>23</sup> App. at p. 65, ¶ 6.

1 work, reside, or maintain offices in California, such as would constitute a physical presence there.<sup>24</sup>  
2 The County does not employ any personnel there.<sup>25</sup> It is not licensed to conduct, and it does not  
3 conduct, any business, official or otherwise, in California, and it does not have any contracts with  
4 any California companies.<sup>26</sup> Instead, the County's activities are solely directed to the safety, health,  
5 welfare and other public interests of its those persons who reside within its jurisdiction, and any  
6 contact the County might have with California is only incidental to those activities related to its  
7 residents' interests.<sup>27</sup>

8  
9 The County does not own, control, manage or otherwise have any economically beneficial  
10 interests in any entity located in California.<sup>28</sup> The County has not been subject to or paid any taxes  
11 in California.<sup>29</sup> The County does not appear in or conduct official business activities in California  
12 on any basis, regular, routine or otherwise, for any reason.<sup>30</sup> The County does not maintain any  
13 bank accounts, investments or funds in California.<sup>31</sup> The County does not advertise in California.<sup>32</sup>  
14 Clearly, the County has no substantial, continuous and systematic official business ties with the  
15 forum state of California that could lead it reasonably to expect to be haled into court in California.  
16 Consequently, no basis exists for this Court's exercise of general personal jurisdiction over the  
17 County in this lawsuit.

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<sup>24</sup> App. at p. 65, ¶ 7.

<sup>25</sup> App. at p. 65, ¶ 7.

<sup>26</sup> App. at p. 65, ¶ 8.

<sup>27</sup> App. at p. 65, ¶ 9.

<sup>28</sup> App. at p. 65, ¶ 10.

<sup>29</sup> App. at p. 65, ¶ 11.

<sup>30</sup> App. at p. 65, ¶ 12.

<sup>31</sup> App. at p. 65, ¶ 12.

<sup>32</sup> App. at p. 65, ¶ 13.

1           **3. Asserting personal jurisdiction over the County would not comport with fair  
2 play or substantial justice.**

3           Even were the Court to determine that the County had sufficient related or unrelated  
4 minimum contacts with the forum state of California, it still must consider whether the "fairness"  
5 prong of the jurisdictional inquiry is satisfied.<sup>33</sup> In determining whether the assertion of personal  
6 jurisdiction would comport with "fair play and substantial justice", a court should evaluate, as  
7 appropriate, (1) the burden on the defendant, (2) the forum state's interest in adjudicating the  
8 dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate  
9 judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the  
10 shared interest of the several states in furthering fundamental substantive social policies.<sup>34</sup>

11           Clearly, the County will bear a substantial burden of litigating this matter if it is  
12 forced to defend itself in California. As established above, the County does not have an office in  
13 California, nor does it have any officials, employees, agents or representative who reside or work in  
14 California. Further, in balancing the potential interests of the states of California and Texas, this  
15 Court's assumption of personal jurisdiction over the County would serve no real interest of the State  
16 of California. The only connection California has to this case is that it is the state where Mr.  
17 Alforque resides. In any event, to the extent Mr. Alforque's claims are based on federal law, he can  
18 obtain essentially the same relief in Texas as he can obtain in California. Furthermore, the proper  
19 forum in which Mr. Alforque should litigate the request for suppression of evidence obtained in the  
20 search incident to his arrest, which he makes in his pleading, is in Texas State court in the trial on the  
21 charges against him for possession of a controlled substance. This Court's assumption of personal  
22 jurisdiction over the County in this civil lawsuit will not further any substantive social policies of the  
23  
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27           <sup>33</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105, 107 S. Ct. 1026, 1033 (1985).

28           <sup>34</sup> *Burger King*, 471 U.S. at 476-77, 105 S. Ct. 2174.

1 State of California. On the other hand, the State of Texas has a substantial interest in the outcome of  
 2 this lawsuit, as the arrest and filing of charges took place in Texas, and the charges against Mr.  
 3 Alforque are still pending in Texas.<sup>35</sup>

4           **4. Asserting personal jurisdiction over the County would violate due process.**

5           For the reasons stated above, this Court's assumption of jurisdiction over the County would  
 6 violate the County's due process rights guaranteed under the Fourteenth Amendment of the  
 7 Constitution of the United States.

8           **B. Dismissal for failure to state a claim is proper pursuant to Federal Rule of Civil  
 9 Procedure 12(b)(6) and 28 U.S.C. § 1915.**

10           **1. The Standard**

11           A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal  
 12 sufficiency of the claims asserted in the complaint.<sup>36</sup> A court may dismiss a complaint for failure to  
 13 state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of  
 14 his claim which would entitle him to relief."<sup>37</sup> Dismissal for failure to state a claim upon which  
 15 relief can be granted is proper if a complaint is vague, conclusory, and fails to set forth any material  
 16 facts in support of the allegation.<sup>38</sup> In deciding a motion to dismiss for failure to state a claim, a  
 17 court should generally limit its review to the pleadings.<sup>39</sup> A court must accept all well-pleaded  
 18 factual allegations in the complaint as true, and must construe them and draw all reasonable  
 19 inferences from them in favor of the nonmoving party.<sup>40</sup>

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<sup>35</sup> App. at p. 35, ¶ 4.

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<sup>36</sup> Fed. R. Civ. Proc. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001).

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<sup>37</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); see also *Haddock v. Board of Dental  
 Examiners*, 777 F.2d 462, 464 (9th Cir. 1985).

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<sup>38</sup> See *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983).

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<sup>39</sup> See *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996).

<sup>40</sup> See *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

1           In spite of the deference a court is bound to pay to a plaintiff's allegations, a court may not  
 2 "supply essential elements of the claim that were not initially pled."<sup>41</sup> Instead, a plaintiff must plead  
 3 sufficient facts that, if true, "raise a right to relief above the speculative level."<sup>42</sup> Furthermore, a  
 4 court is not required to credit conclusory legal allegations cast in the form of factual allegations,  
 5 unwarranted deductions of fact, or unreasonable inferences.<sup>43</sup> If a court finds that a complaint fails  
 6 to state a claim, it should grant leave to amend unless it determines that the pleading could not  
 7 possibly be cured by the allegation of other facts.<sup>44</sup>

8  
 9           As a general matter, a court may not consider any material beyond the pleadings in deciding  
 10 a Rule 12(b)(6) motion.<sup>45</sup> If a court considers matters outside of the pleadings, it must treat the  
 11 motion to dismiss as a motion for summary judgment under Rule 56 of the Federal Rules of Civil  
 12 Procedure "and all parties shall be given reasonable opportunity to present all material made  
 13 pertinent to such motion by Rule 56."<sup>46</sup>

14  
 15           Further, the Court can also dismiss this lawsuit for failure to state a claim on its own motion,  
 16 independently of a party's motion to do so, and without waiting for a plaintiff to respond or  
 17 permitting him to replead.<sup>47</sup> This ability is not limited to suits brought by prisoners.<sup>48</sup>

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 21           <sup>41</sup> *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

22           <sup>42</sup> *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1964 (2007).

23           <sup>43</sup> See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

24           <sup>44</sup> See *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995).

25           <sup>45</sup> See *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

26           <sup>46</sup> See Fed. R. Civ. P. 12(b)(6); see also *Hal Roach Studios, Inc.*, 896 F.2d at 1555 n.19.

27           <sup>47</sup> 28 U.S.C. § 1915(e)(2)(ii); see also *Johansen v. San Diego Police Dep't*, No. 07cv1601-LAB (LSP), 2007 U.S. Dist. LEXIS 60917, \*2 (S.D. Cal. Aug. 19, 2007); see also *Lopez v. Smith*, 203 F.3d. 1122, 1127 (9th Cir. 2007) (en banc) ("[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim").

28           <sup>48</sup> See *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001).

1           Mr. Alforque's pleadings are not clear whether he has limited his claim to just state law torts  
 2 or whether he intends to claim violation of his federal rights under § 1983. The fact that he has only  
 3 claimed diversity as the jurisdictional basis for bringing his case in federal court would seem to  
 4 imply the former. However, his reference to his rights under the Fourth Amendment would seem to  
 5 imply the latter, even though he has neither specifically referred to § 1983 nor claimed federal  
 6 question jurisdiction. The County's Motion to Dismiss, therefore, will address Mr. Alforque's  
 7 pleadings in light of either possibility as it is necessary to do so.<sup>49</sup>

9           **2. Assuming Mr. Alforque's claim is for false arrest, no County official  
 10 participated in his arrest, and such a claim is barred by the statute of limitations.**

11           To state a claim for false arrest against the County under § 1983, Mr. Alforque must have  
 12 alleged facts from which it may be shown or inferred that: (1) that a County employee committed  
 13 the alleged false arrest under a formal governmental policy or longstanding practice or custom that is  
 14 the customary operating procedure of the County; and (2) that the individual who committed the  
 15 false arrest was either an official with final policy-making authority for the County or was a  
 16 subordinate whose false arrest and the basis for it was ratified by a County official with final policy-  
 17 making authority.<sup>50</sup> Absent any involvement in his arrest by some officer or employee of the County  
 18 and any way to show that a County policy or custom was behind his arrest, the County cannot be  
 19 liable to Mr. Alforque for his allegation of false arrest. As established above, Mr. Alforque alleges  
 20 he was arrested by a "Texas state trooper", who is an officer of the Texas Department of Public  
 21 Safety. He makes no allegation that any County officer or employ had anything to do with the  
 22 search and arrest of which he complains. Mr. Alforque simply cannot establish the County's

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 26           <sup>49</sup> Mr. Alforque's request that this Court suppress evidence in his pending criminal trial in Texas is  
 27 not addressed in this Motion in response to his civil lawsuit, as this matter only relates to his  
 criminal trial.

28           <sup>50</sup> See *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691, 98 S. Ct. 2018 (1978); *Gillette v. Delmore*,  
 979 F.2d 1342, 1346-47 (9th Cir. 1992).

1 liability for false arrest based on his allegations.

2 Furthermore, Mr. Alforque's false arrest claim can be dismissed for failure to state a claim  
 3 based on the running of the statute of limitations period if the running of the statute is apparent on  
 4 the face of his Complaint.<sup>51</sup> Dismissal on statute of limitations grounds can be granted pursuant to  
 5 Rule 12(b)(6) "only if the assertions of the complaint, read with the required liberality, would not  
 6 permit the plaintiff to prove that the statute was tolled."<sup>52</sup> In determining the proper statute of  
 7 limitations for actions brought under § 1983, federal courts look to the statute of limitations for  
 8 personal injury actions in the forum state.<sup>53</sup> Federal law, however, determines when a § 1983 claim  
 9 accrues.<sup>54</sup> A claim accrues under federal law when a plaintiff knows or has reason to know of the  
 10 injury which is the basis of his cause of action.<sup>55</sup>

12 Mr. Alforque's factual allegations, that he was stopped and placed under arrest by a "Texas  
 13 state trooper" and that his arrest was based on "racial profiling", together with his references to  
 14 seizure in violation of the Fourth Amendment and that evidence against him was illegally obtained,  
 15 makes his claim sound in 42 U.S.C. § 1983 for unreasonable search and/or seizure, i.e., for false  
 16 arrest. A § 1983 claim based on false arrest in violation of the Fourth (and Fourteenth) Amendment  
 17 would have accrued at the time Mr. Alforque alleges he was wrongfully arrested.<sup>56</sup> Mr. Alforque's  
 18

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 21 <sup>51</sup> See *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (affirming dismissal of  
 22 federal securities claim because allegations of complaint established affirmative defense of statute of  
 23 limitations).

24 <sup>52</sup> *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (internal quotations omitted).

25 <sup>53</sup> See *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). Because federal courts look to state  
 26 law for statutes of limitations, the result would be the same were he only to be raising a state law tort  
 27 claim against the County for false arrest. It is therefore not necessary to address a possible state law  
 28 tort claim for false arrest separately.

<sup>54</sup> See *Maldonado*, 370 F.3d at 955.

<sup>55</sup> See *Maldonado* at *id.*

<sup>56</sup> See *Wallace v. Kato*, 549 U.S. 384, ---, 127 S. Ct. 1091, 1095 (2007); *Simpson v. Thomas*, 528 F.3d 685 (9th Cir. Cal. 2008).

1 Complaint plainly alleges on its face that he was stopped and arrested in 2005 and charged with  
 2 possession of a controlled substance, and it further alleges that he made the arresting officer aware  
 3 that the drugs were validly in his possession at the time of his arrest.<sup>57</sup> This then is when Mr.  
 4 Alforque would have been aware of the injury that would be the basis of any false arrest claim and  
 5 when, therefore, such a claim would have accrued.  
 6

7 Furthermore, “the statute of limitations upon a § 1983 claim seeking damages for a false  
 8 arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings,  
 9 begins to run at the time the claimant becomes detained pursuant to legal process.”<sup>58</sup> Assuming, for  
 10 purposes of this Motion to Dismiss Pursuant to Rule 12(b)(6) only, that California is the forum state,  
 11 either a one-year or a two-year statute of limitations applies to Mr. Alforque’s § 1983 claims.<sup>59</sup>  
 12 Because he did not file his Complaint until April 3, 2008, Mr. Alforque’s § 1983 claim is time-  
 13 barred. So too is any state law tort claim for false arrest.  
 14

15 In addition, nothing in Mr. Alforque’s Complaint would suggest that any equitable tolling  
 16 provision would apply to the statute of limitations applicable to his claims. In § 1983 cases, a  
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18 <sup>57</sup> Pl.’s Orig. Compl. at pp. 1, 2.

19 <sup>58</sup> See *Wallace v. Kato*, 549 U.S. 384, ---, 127 S. Ct. 1091, 1095 (2007); see also *Feurtado v.*  
 20 *Dunivant*, 244 Fed. Appx. 81, 82 (9th Cir. 2007) (citing to *Wallace* and stating that false arrest  
 claims “accrue once legal process is initiated”).

21 <sup>59</sup> See *Johansen v. San Diego Police Dep’t*, No. 07cv1601-LAB-LSP, 2007 U.S. Dist. LEXIS  
 22 60917, \* 8 (S.D. Cal. Aug. 19, 2007) (applying Cal. Code Civ. P. Ann. § 335.1 (Deering 2005) (two  
 23 years for claims of personal injury), and § 340(c) (Deering 2005) (one year for claims of false  
 24 imprisonment) to plaintiff’s § 1983 claims). In any event, even were Texas considered to be the  
 25 forum state, the statute of limitations would be two years for false arrest. See *Price v. City of San*  
 26 *Antonio*, 431 F.3d 890, 892 (5th Cir. 2005) (applying two-year limitations period under Tex. Civ. P.  
 27 & Rem. Code Ann, § 16.003 (Vernon 2005) to plaintiff’s § 1983 claim for false arrest and malicious  
 28 prosecution).

federal court applies the forum state's equitable tolling rules as long as those rules are not inconsistent with federal law.<sup>60</sup> Assuming again, for purposes of this Motion to Dismiss only, that California is the forum state, then the "sole issue" this Court must determine on this Motion to Dismiss based on limitations is "whether the complaint, liberally construed in light of [the Court's] 'notice pleading' system, adequately alleges facts showing the potential applicability of the equitable tolling doctrine."<sup>61</sup> In other words, equitable tolling requires Mr. Alforque to "plead and prove that he had neither actual nor constructive knowledge of the facts constituting [his] cause of action despite [his] due diligence."<sup>62</sup> Mr. Alforque's facts would have to suggest that "despite all due diligence, [he was] unable to obtain vital information bearing on the existence of his claim."<sup>63</sup> "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs."<sup>64</sup>

No matter how liberally his Complaint might be construed as a pro se plaintiff, Mr. Alforque has not pleaded any facts that would suggest the applicability of equitable tolling to his cause of action. In addition, Mr. Alforque has not pleaded that he was a prisoner with "extraordinary circumstances" beyond his control that made it "impossible to file a petition on time."<sup>65</sup> Besides, any ignorance of the law on his part in knowing how to calculate the tolling periods is not an

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<sup>60</sup> See *Guerrero v. Gates*, 442 F.3d 697, 706 n.34 (9th Cir. 2006).

<sup>61</sup> *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993) (emphasis in original).

<sup>62</sup> *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir 1996) (internal quotations omitted); see also *Johansen*, 2007 U.S. Dist. LEXIS 60917 at \* 8 ("Plaintiff has pleaded no facts suggesting that tolling or laches should apply").

<sup>63</sup> *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).

<sup>64</sup> *Id.*

<sup>65</sup> *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006).

1 "extraordinary circumstance" justifying equitable tolling.<sup>66</sup> Nothing in Mr. Alforque's pleading  
 2 suggests that equitable tolling should apply to his case against the County.

3       **3. Assuming Mr. Alforque's claim is for malicious prosecution, he has not pleaded  
         the necessary elements, and such a claim, if brought under § 1983, is barred by  
         the doctrine of *Heck v. Humphrey*.**

6       The Supreme Court has never determined whether a claim for malicious prosecution is  
 7 cognizable under § 1983, much less how such a claim would proceed.<sup>67</sup> Mr. Alforque has not  
 8 specifically pleaded such a claim in so many words; however, the general rule in the Ninth Circuit is  
 9 that "a malicious prosecution claim is not cognizable under § 1983 if process is available in the state  
 10 judicial system to provide a remedy."<sup>68</sup> Of course, the application of that rule in this case is  
 11 complicated by the fact that Mr. Alforque's arrest occurred in Texas, which does not fall within of  
 12 the Ninth Circuit. Assuming, for purposes of this Motion to Dismiss only, however, that both Ninth  
 13 Circuit rules and Texas law would generally not recognize a malicious prosecution claim by Mr.  
 14 Alforque under § 1983, "an exception exists to the general rule when a malicious prosecution is  
 15 conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended  
 16 to subject a person to a denial of constitutional rights."<sup>69</sup> Nevertheless, a malicious prosecution  
 17 claim brought by Mr. Alforque, under either § 1983 or purely as a tort claim under state law, would  
 18 have to be based on state law elements.<sup>70</sup>

21       Therefore, even should Mr. Alforque be attempting to state a claim for malicious  
 22 prosecution, under California law he is required to plead and prove that there was a prior proceeding  
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25       <sup>66</sup> See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

26       <sup>67</sup> See *Wallace*, 127 S. Ct. at 1096, n.2.

27       <sup>68</sup> *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

28       <sup>69</sup> *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc).

<sup>70</sup> See *Usher*, 828 F.2d at 562.

1 commenced by or at the direction of the County that was: (1) pursued to a legal termination  
 2 favorable to him; (2) brought without probable cause; and (3) initiated with malice.<sup>71</sup> He is required  
 3 to plead and prove essentially the same elements under Texas law.<sup>72</sup> Mr. Alforque's Complaint does  
 4 not allege any facts from which it may be inferred, even on a liberal reading of his Complaint, that  
 5 the charges against him were pursued to a termination favorable to him. Indeed, his pleadings  
 6 indicate just the opposite when he refers to "Martin County's pending cases" against him and the  
 7 fact that Martin County "wish[es] to prosecute plaintiff under evidence which was illegally and  
 8 unjustifiably obtained and being used against the plaintiff."<sup>73</sup> In any event, for purposes of this  
 9 Motion to Dismiss, this Court should not assume Mr. Alforque could prove a favorable termination  
 10 when he has not even alleged such, and any state law claim for malicious prosecution he might be  
 11 attempting to make would fail.

13 Furthermore, to the extent Mr. Alforque might be bringing a malicious prosecution claim  
 14 under § 1983, such a claim should be dismissed under the rule established in the case of *Heck v.*  
 15 *Humphrey*. In that case, the Supreme Court held that a plaintiff cannot bring a § 1983 action for  
 16 damages for a wrongful conviction, or for any other harm caused by actions that, if unlawful, would  
 17 render a conviction or sentence invalid, or even imply that it was invalid, unless that conviction or  
 18 sentence already has been overturned, set aside, or otherwise determined to be wrongful.<sup>74</sup> Although

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21<sup>71</sup> See *Villa v. Cole*, 4 Cal. App. 4th 1327, 1335, 6 Cal. Rptr. 2d 644 (1992); *Sagonowsky v. More*,  
 22 64 Cal. App. 4th 122, 128, 75 Cal. Rptr. 2d 118 (1998) ("It is hornbook law that the plaintiff in a  
 23 malicious prosecution action must plead and prove that the prior judicial proceeding of which he  
 complains terminated in his favor.

24<sup>72</sup> See *Kroger Tex. L.P. v. Suberu*, 216 S.W.3d 788, 792 & n. 3 (Tex. 2006) (setting out the elements  
 25 as: (1) a criminal prosecution was commenced against the plaintiff; (2) the Defendant initiated or  
 26 procured the prosecution; (3) the prosecution was terminated in the plaintiff's favor; (4) the plaintiff  
 27 was innocent of the charge; (5) the defendant did not have probable cause to initiate or procure the  
 prosecution; (6) the defendant acted with malice; and (7) the plaintiff suffered damages as a result of  
 the prosecution).

28<sup>73</sup> Pl.'s Orig. Compl. at p. 3 ("Summary") and p. 2.

<sup>74</sup> See *Heck v. Humphrey*, 512 U.S. 477, 786-87, 114 S. Ct. 2364 (1994).

1     *Heck v. Humphrey* is only applicable if there has been a criminal conviction, nevertheless, a civil  
2 action for damages arising from a criminal conviction, assuming there was one, is not cognizable  
3 under § 1983 unless Mr. Alforque has pleaded facts that, if proved, would establish that the criminal  
4 conviction has been successfully attacked.<sup>75</sup> He has not done so, and his cause of action should be  
5 dismissed for failure to state a claim.  
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7                 The County would argue that, on the face of Mr. Alforque's pleadings alone, he has not  
8 pleaded the facts necessary to state a claim for malicious prosecution, should he even be attempting  
9 to make such a claim. There is therefore no need to present any matters to this Court outside the  
10 pleadings in order for it to dispose of this issue. However, the fact is that there has not been a  
11 termination of the legal proceedings instituted against Mr. Alforque, favorable or otherwise. As  
12 shown by the evidence in the Appendix filed in support of this Memorandum, an arrest warrant has  
13 been issued for Mr. Alforque as a result of his having failed to appear for trial on his arrest.<sup>76</sup> The  
14 County would request the Court to not consider this evidence if it is unnecessary to do so to dispose  
15 of any malicious prosecution claim it might infer from Mr. Alforque's pleadings. However, if Mr.  
16 Alforque's pleadings alone are not sufficient to dispose of this issue, then the County would request  
17 the Court to treat this Motion as one for summary judgment under Rule 56 and dispose of this issue  
18 as appropriate under that Rule.  
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26                 <sup>75</sup> See *Cheek v. Schwarzenegger*, No. C 07-1674 MHP, 2007 U.S. Dist. LEXIS 55552, \*2-3 (N.D.  
27 Cal. July 24, 2007).

28                 <sup>76</sup> App. at p. 64, ¶ 5; pp. 68-71.

1     C.     **Dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(3) because venue  
2       is not proper under 28 U.S.C. § 1391.**

3       If an action is filed in an improper judicial district, the court may dismiss the action upon  
4       timely objection.<sup>77</sup>   Venue is properly established under one of two provisions relevant to this  
5       lawsuit: (1) in a judicial district where the defendant resides; or (2) in a judicial district where a  
6       substantial part of the events or omissions giving rise to the claim occurred.<sup>78</sup>   Venue where the  
7       plaintiff resides is not one of those provisions.   Venue is clearly not proper under the second  
8       provision, based on the factual allegations in Mr. Alforque's Complaint, as he only alleges that he  
9       was stopped and arrested "inside Martin County" and that Martin County has charged him with  
10      possession of a controlled substance.<sup>79</sup>   These actions occurred solely within Martin County in the  
11      State of Texas.   Mr. Alforque's choice to bring suit in the Southern District of California does not  
12      rest on any event that occurred, in whole or in part, in California, permitting him to make venue  
13      proper in this Court.

14  
15       Furthermore, as for the first provision, a defendant that is an unincorporated association is  
16       deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the  
17       action is commenced.<sup>80</sup>   Although the County is not aware of any case law deciding the issue of  
18       whether a county is considered to be an "unincorporated association" under §1391, to the extent the  
19       County is considered to be such, it is not subject to the personal jurisdiction of this Court, as has  
20       been established above in the County's Motion to Dismiss for Lack of Personal Jurisdiction, so it

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24       <sup>77</sup> Fed. R. Civ. P. 12(b)(3).

25       <sup>78</sup> 28 U.S.C. § 1391(a)(1) and (2) (for single defendants in diversity actions); 28 U.S.C. § 1391(b) (1)  
26       and (2) (for single defendant's in non-diversity actions).

27       <sup>79</sup> Pl.'s Orig. Compl. at pp. 1, 2.

28       <sup>80</sup> 28 U.S.C. § 1391(c); *see, e.g., Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S.  
556, 562, 87 S. Ct. 1746, 1750 (1967) (extending § 1391(c) to include unincorporated associations  
although statute refers to "defendant that is a corporation").

1 cannot be found to "reside" in the Southern District of California and dismissal for improper venue  
 2 under Rule 12(b)(3) is appropriate.<sup>81</sup>

3 **D. Transfer of venue to a proper district is proper pursuant to 28 U.S.C. § 1406(a).**

4 As an alternative to dismissal, a court lacking personal jurisdiction may, in the interest of  
 5 justice, transfer a case to a court that has such jurisdiction and where venue is therefore proper, i.e.,  
 6 where the action could have been brought under § 1391.<sup>82</sup> As argued above, all of the actions of the  
 7 County that were directed against Mr. Alforque occurred in Martin County in Texas. Further, the  
 8 County is subject to personal jurisdiction in Texas but not in California. Therefore, to the extent it is  
 9 considered to be an unincorporated association and for the purposes of venue, the County is a  
 10 "resident" of Texas and not California. Accordingly, venue is proper in the appropriate federal court  
 11 Texas, pursuant to 28 U.S.C. § 1391(a) and (c), and this Court may transfer this case to a court of  
 12 proper venue in Texas pursuant 28 U.S.C. § 1406(a) rather than dismiss this case, in the interest of  
 13 justice. The County would argue that it has sufficient contacts, or alternatively, the most significant  
 14 contacts, with the United States District Court for the Western District of Texas, Midland Division,  
 15 making that the proper venue, under § 1391(c), to which this Court should transfer this case.

16 **E. Transfer of venue for the convenience of the parties is proper pursuant to 28 U.S.C.  
 17 § 1404(a).**

18 Finally, should the Court determine that it has personal jurisdiction over the County and that  
 19 venue is proper in this Court, the County would request the Court to transfer venue of this case to  
 20 United States District Court for the Western District of Texas, Midland Division, pursuant to 28  
 21

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 23  
 24  
 25 <sup>81</sup> Compare *Omaha Tribe of Neb. v Barnett*, 245 F Supp 2d 1049, 1056 (DC Neb 2003) (determining  
 26 that plaintiff failed to establish that forum state could exercise personal jurisdiction, pursuant to  
 27 plaintiff's state long-arm statute, over defendants who were attorneys general of three neighboring  
 28 states, and dismissing under Fed. R. Civ. P. 12(b)(3) for improper venue).

<sup>82</sup> 28 U.S.C. § 1406(a); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467, 82 S. Ct. 913, 916 (1962);  
*Alpha Mech. Heating & Air Conditioning, Inc. v. SEI Group, Inc.*, No. 06cv1232-LAB-NLS, 2007  
 U.S. Dist. LEXIS 2751, \*6 (S.D. Cal. Jan. 3, 2007).

1 U.S.C. § 1404(a), which provides that “[f]or the convenience of parties and witnesses, in the interest  
 2 of justice, a district court may transfer any civil action to any other district or division where it might  
 3 have been brought.”<sup>83</sup> In ruling on a motion to transfer venue under § 1404(a), a court should  
 4 consider private and public interest factors.<sup>84</sup> Private factors to be considered include: (1) the  
 5 relative ease of access to sources of proof; (2) availability of compulsory process for attendance of  
 6 unwilling; (3) the cost of obtaining attendance of willing witnesses; and (4) all other practical  
 7 problems that make trial of a case easy, expeditious and inexpensive.<sup>85</sup> Public factors to be  
 8 considered include: (5) the local interest in having localized controversies decided at home; (6) the  
 9 interest in having the trial of a diversity case in a forum that is at home with the law that must govern  
 10 the action; (7) the avoidance of unnecessary problems in conflict of laws, or in the application of  
 11 foreign law; and (8) the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>86</sup>

13       The present forum is inconvenient because the Texas State Trooper who arrested Mr.  
 14 Alforque and the County officials who initiated legal process against him all reside in Martin  
 15 County, Texas and are subject to process of the United States Court for the Western District of  
 16 Texas. The cost and difficulty of obtaining their testimony will both be less in the Western District  
 17 of Texas than before this Court. Further, the documents related to the actions taken against Mr.  
 18 Alforque of which he complains are all located in Martin County, Texas, and the location of all the  
 19 events of which Mr. Alforque complains occurred in the Western District of Texas.

21       In addition, to the extent that Mr. Alforque’s claims against the County are to be determined  
 22 by Texas law, the United States District Court for the Western District of Texas may be presumed to  
 23 be more familiar with Texas law. That court is best situated to adjudicate this matter. Also, because

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25       <sup>83</sup> 28 U.S.C. § 1404(a); *see also, generally, Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985).

26       <sup>84</sup> *See Decker Coal Co. v. Commonwealth of Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

27       <sup>85</sup> *See id.*

28       <sup>86</sup> *See id.*

1 Mr. Alforque has demanded a jury trial, jurors in the Western District of Texas will have a greater  
2 connection to this litigation, as it arose from the conduct of parties while in that District and has the  
3 greatest impact on the interests of justice related to their public concerns. All of these factors  
4 together, when evaluated in light of the fact that the County has no connection to California  
5 whatsoever other than that it is where it has served process on Mr. Alforque, outweigh Mr.  
6 Alforque's right to choose venue in this Court, even were this Court a court of proper venue, and  
7 support the County's request that this case be transferred to the United States District Court for the  
8 Western District of Texas for the convenience of the parties.

### **III. Conclusion**

For the reasons set forth above, Plaintiff has not established personal jurisdiction over Defendant MARTIN COUNTY, TEXAS and venue is not proper in the Southern District of California, Lubbock Division. Therefore, Defendant hereby requests this Court to grant its Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(2), or alternatively, its Motion to Dismiss for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6); or alternatively, its Motion to Dismiss for Improper Venue Pursuant to Federal Rule of Civil Procedure 12(b)(3). Furthermore, because it is impossible for Plaintiff, Mr. Alforque, to cure the defects in his pleadings, his lawsuit should be dismissed with prejudice.

In the alternative, Defendant requests this Court to grant its Motion to Transfer Venue to a Proper District Pursuant to 28 U.S.C. § 1406(a), or alternatively, its Motion to Transfer Venue for the Convenience of the Parties Pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

Dated: July 21, 2008

**CRENSHAW, DUPREE & MILAM, L.L.P.**

By: s/ Mark W. McBrayer, by consent  
**Attorneys for Defendant**  
**MARTIN COUNTY, TEXAS**

1 Dated: July 21, 2008

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**SANDLER, LASRY, LAUBE, BYER**  
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